

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 16, 2004

TO : Curtis Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Transwestern Publishing
Case 16-CA-23050

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by suing a former employee. We conclude that the charge should be dismissed, absent withdrawal, both because the Charging Party failed to cooperate with the Region's investigation and because the Employer's lawsuit was not directed at protected activity.

FACTS

Transwestern Publishing is a nationwide publisher of yellow page telephone directories. Charging Party Irving Kravitz was employed as an account executive for Transwestern's San Antonio, Texas operation. Kravitz's main job function was to solicit firms to advertise in Transwestern's yellow book. In May 2002, Kravitz informed Transwestern management of his belief that three of his co-workers were submitting fraudulent accounts. Management instructed Kravitz not to discuss the issue any further while it investigated his claims. Kravitz did not obey management's instruction and allegedly lied to management in denying that he had discussed the matter with others. As a result, Kravitz was discharged. Kravitz filed an unfair labor practice charge contesting his discharge in Case No. 16-CA-22386, which the Region dismissed on February 20, 2003.¹ On April 30, the Office of Appeals sustained the Region's dismissal.

Meanwhile, on March 3, Transwestern filed a civil suit against Kravitz in state court. The lawsuit alleged that Kravitz had engaged in certain post-employment misconduct that constituted tortious interference with business relations, misappropriation of confidential information, theft and conversion. On March 3 and April 10, the district court entered a TRO and preliminary injunction in favor of Transwestern. Also on April 10, the court issued a judgment of contempt against Kravitz for failing to abide by the TRO,

¹ All dates are in 2003 unless specified otherwise.

namely, by failing to return confidential company information in Kravitz's possession.

On September 2, 2004, the state court dismissed Transwestern's lawsuit based on a settlement reached by the parties. Although the Region repeatedly asked Kravitz for copy of the settlement agreement, the Charging Party failed to produce one. Transwestern declined to release a copy of the agreement to the Region unless the Charging Party waived his right to confidentiality under the agreement, which Kravitz did not do.

Kravitz alleges that Transwestern filed the state court suit with an unlawful retaliatory motive. In support of this allegation, Kravitz alleges that prior to April 30, 2003, Transwestern offered to drop its lawsuit if Kravitz dropped a counterclaim he had filed and withdrew his appeal of the Region's decision to dismiss his discharge unfair labor practice charge.

ACTION

Without deciding whether the lawsuit was reasonably based or filed with a retaliatory motive under either Bill Johnson's² or BE&K,³ we conclude that the Employer did not violate Section 8(a)(1) because the lawsuit was not directed at protected activity. We further conclude that the charge should be dismissed, absent withdrawal, because the Charging Party failed to cooperate in its investigation.

A threshold question in any Section 8(a)(1) case involving a lawsuit is whether the lawsuit is directed at or motivated by any protected activity.⁴ If the lawsuit is not aimed at conduct protected by Section 7 of the Act, then it cannot be said to violate Section 8(a)(1).

We conclude that the Employer's lawsuit was not directed at or motivated by any protected, concerted activity. The Charging Party does not contend that he engaged in any protected activity, other than filing unfair

² Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 742 (1983).

³ BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

⁴ Bill Johnson's Restaurants v. NLRB, 461 U.S. at 748-49 ("it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights guaranteed by Section 7 . . .").

labor practices charges. The lawsuit, on the other hand, clearly complained of Kravitz's allegedly tortious misuse of company documents, among other things. Furthermore, an inference that Transwestern's settlement offer establishes that it was motivated in filing its lawsuit because Kravitz filed an unfair labor practice charge over his termination, or lodged an appeal of its dismissal, is unsupportable. Absent any independent evidence of motivation, it is reasonable to conclude that the Employer's settlement offer, which would have required, among other things, that Kravitz withdraw that appeal, was simply an effort to resolve all disputed matters between the parties. Moreover, the fact that Transwestern continued to press forward with its lawsuit for over a year after Kravitz's appeal had been dismissed strongly suggests that the unfair labor practice or the appeal played no role in the filing of the suit.

We further conclude that dismissal of this charge is warranted because the Charging Party failed to cooperate with the Region's investigation by supplying it with a copy of the settlement agreement. The terms of the settlement, and particularly whether the Employer essentially obtained all the relief it was seeking in court, would be relevant to any analysis of reasonable basis.⁵ The Charging Party's failure to release the agreement to the Region, or even to agree to the Employer's release of the agreement, prevented the Region from making this critical assessment. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

⁵ In Bill Johnson's Restaurants, the Court held that a completed lawsuit that was successful (i.e., meritorious resulting in a judgment for the plaintiff) cannot be an unfair labor practice. 461 U.S. at 747.